Before the
Federal Communications Commission
Washington, DC

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	**MM Docket No. 00-148**
Table of Allotments,	)	RM-9939
FM Broadcast Stations.	)	RM-10198
(Quanah, Texas, *et al.*)	)	

Filed With: **Office of the Secretary**
Directed to: **The Commission**

OPPOSITION TO APPLICATION FOR REVIEW

J. & J. Fritz Media, Ltd. (formerly Fritz Broadcasting Co., Inc.) ("Fritz"), by its attorney, hereby respectfully submits its Opposition to the "Application for Review"[1] filed by Rawhide Radio, LLC, Capstar TX Limited Partnership, CCB Texas Licenses, L.P., and Clear Channel Broadcasting Licenses, L.P. ("Joint Petitioners") in the above-captioned proceeding. With respect thereto, the following is stated:

1. Joint Petitioners are seeking review of the *Memorandum Opinion and Order* ("*MO&O*"), DA 04-1080 (April 27, 2004), in the above-captioned proceeding. That *MO&O* denied reconsideration of the *Report and Order* ("*R&O*") in this proceeding, DA 03-1533 (May 8, 2003), which had dismissed Joint Petitioners' Counterproposal due to an impermissible short-spacing to an outstanding construction permit. In essence, as it argued in seeking reconsideration, the Joint Petitioners are claiming that the Commission's staff somehow erred because it did not, on its own, break off and consider separately a portion of the Joint Petitioners' defective

[1] J. & J. Fritz Media, Ltd. (togehter with M&M Broadcasters, Ltd.) filed a Motion for Extension of Time on July 2, 2004. Joint Petitioners opposed that Motion on July 12, 2004. A reply to that Opposition will be filed separately.

counterproposal and treat that severed portion as if it had been filed correctly as a new "petition for rule making" as of the time the counterproposal was filed, more than two and one-half years earlier. The *MO&O* properly rejected this specious argument. For the Commission to indulge such an exercise in fiction would be novel at best, would create a procedural morass, and would clearly prejudice the interests of other parties.

2. As an initial matter, Fritz must agree (but for other reasons) with Joint Petitioners' stated surprise at the length of time which was consumed prior to the dismissal of the Joint Petitioners' Counterproposal. It must be recalled that this Counterproposal was patently defective on its face. In the Counterproposal, Joint Petitioners acknowledged that the proposed channel substitution was short-spaced with the then-pending upgrade application for KICM(FM) (now KNOR(FM)), Krum, Texas. This is not a case in which some minor defect was discovered after filing; rather, the Joint Petitioners knew full well prior to filing that their Counterproposal was technically deficient and thus contrary to the Commission's longstanding policy that counterproposals must be technically correct at the time of their filing. *Susquehanna and Hallstad, PA*, 15 FCC Rcd 24160, n.2 (Allocations Branch 2000); *Broken Arrow and Bixby, Oklahoma, and Coffeyville, KS*, 3 FCC Rcd 6507, 6511 (Allocations Branch 1988). Moreover, while Commission policy does provide a limited opportunity for counterproponents to correct conflicts with applications filed during or immediately prior to a rule making comment period, that policy does not extend to situations such as the current one in which the Joint Proponents not only had every opportunity to be aware of the prior application filing but actually admitted to knowledge of that filing. *Conflict Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4745 (1993). Therefore, the appropriate response

to the Counterproposal would have been a quick and decisive summary dismissal. In essence, the Joint Petitioners are now complaining that they have been prejudiced by the passage of time, when in actuality their Counterproposal was accorded more processing than was due it.

3. Further, Joint Petitioners appear unwilling to accept responsibility for any delay which was created by their own actions. It bears repeating that it was Joint Petitioners themselves who chose to go ahead with the filing of a Counterproposal which they knew to be defective at the time of filing. It was the Joint Petitioners who chose to attach the remaining portions of their proposal to the Archer City proposal and file the entire package as one enormous Counterproposal involving some 22 communities in Texas and Oklahoma. Obviously, the size of this proposal alone was sufficient to lead to processing delay. Further, it is well known that submission of flawed proposals to the Commission almost invariably leads to processing delays. In addition, it was Joint Petitioners themselves that sought extensions of time in which to provide the document and related information sought by Commission's staff in its *Request for Supplemental Information*, DA 02-158 (Jan. 18, 2002), and then ultimately refused to provide the one document specifically requested by the Commission -- a refusal which persists to this day. Obviously, this arrogant course of conduct is also one calculated to create further delay, as the Commission's staff was left to evaluate claims about an agreement rather than the agreement itself.[2]

4. Joint Petitioners therefore cannot be heard to complain at this late date because the entire package which they themselves created was dismissed due to the defect which they knew to

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[2] The refusal to comply with a clear Commission request for particular information also constituted a failure to prosecute the Counterproposal and thus was itself an independent basis for dismissal of the Counterproposal.

exist at the time of its filing. Moreover, Joint Petitioners had it within their power at any time during the pendency of their Counterproposal to end the delay and forestall intervening events simply by seeking dismissal of the Counterproposal and refiling their current pared-down proposal as a new petition for rule making. The reason for failing to take this course is quite clear: the Joint Petitioners wished to obtain a procedural advantage for themselves by filing and prosecuting their entire package as a counterproposal. The filing of a new rule making petition or the commencement of a new rule making proceeding would not have afforded the same cut-off protection that the Joint Petitioners clearly were seeking to obtain as would occur through linking all of their proposals to the one that was mutually exclusive with the Quanah proposal which originated this proceeding. Joint Petitioners were not and are not entitled to that protection, however, given that the sole portion of the Counterproposal which provided the necessary mutual exclusivity with the Quanah proposal was knowingly filed with a fatal defect. Clearly, the equities do not favor granting any extraordinary relief under the circumstances.

5. Here, the Joint Petitioners have chided the Commission's staff for not taking the novel step of breaking off one (allegedly acceptable) portion of a much larger and convoluted Counterproposal to create a new rule making proceeding. In other words, Joint Petitioners were expecting the Commission's staff to fix their defective proposal for them. It is not the responsibility of the Commission, however, to determine that one portion of a massive counterproposal might be capable of being separated from the rest of that proposal; to further determine that this portion might be viable as a petition for rule making; to assume that the counterproponents would favor separating the one portion of the counterproposal in this manner; and to thereby issue a notice of proposed rule making for the smaller portion of the initially filed

counterproposal. Further, in their Counterproposal, the Joint Petitioners indicated that they expected any action on the separate so-called "KVCQ Alternative" to be "in this proceeding since it has been advanced as a part of the complete proposal which conflicts with the Quanah petition." Counterproposal at ¶ 67. There is no indication in this language of any desire to see a "new" rule making proceeding established under *any* circumstance. Moreover, at no point during the entire proceeding did the Joint Petitioners take the affirmative step within their own control (as they could have) of filing a new rule making petition. Clearly, Joint Petitioners were seeking to have their cake and eat it too, as they sought to retain a procedural advantage to which they were not entitled. Having made that choice, they must now live with the consequences.

6. Furthermore, while Joint Petitioners are correct that, in some cases, the Commission has considered a counterproposal which is found not to be mutually exclusive with an original petition as a new proposal, those cases are not apposite here. None of the cases cited by Joint Petitioners involved a situation in which the Commission has taken one portion of a defective counterproposal and treated it separately as a new petition for rule making. The one case cited by Joint Petitioners which appears similar, *Kingston, Tennessee*, 2 FCC Rcd 3589 (Allocations Branch 1987), actually involved a situation in which a counterproponent sought to file an alternative proposal in a new petition for rule making in the same proceeding in which it had already filed a counterproposal. It was that new petition which formed the basis for the separate rule making proceeding in which related matters were considered. *Id.* at n. 1.

7. If the Commission were to consider establishing a new rule making proceeding and issuing a new notice of proposed rule making, such action could be taken only after determining that it would be in accordance with technical requirements as they stand at the present time. The

Joint Petitioners have argued that the Commission's staff should not have taken so long to dismiss its defective Counterproposal, and that it should be afforded some sort of *nunc pro tunc* treatment. It is not clear, however, at exactly what time the Commission's staff "should have" acted, and thus as of what time the "new" proposal should be considered to have been filed. Obviously, adoption of the Joint Petitioners' suggestion would open a procedural morass.

8. Further, if the Commission were to engage in this exercise in fiction and fantasy, it must afford similar treatment to other parties whose rule making petitions then would have been erroneously dismissed. Joint Petitioners glibly assert that they should be given some sort of priority over later-filers, but they provide no basis whatsoever for that assertion. It is a fundamental principle of Commission practice that rule making petitions are not afforded "cut-off" protection until after the public has been provided notice and an opportunity to comment or file counterproposals after the issuance of a notice of proposed rule making. No such notice has ever been issued with regard to Joint Petitioners' proposal. Thus, if the Commission were to consider Joint Petitioners' alternative proposal as if it had been filed as a separate petition for rule making not in conflict with the Quanah proposal, then it cannot be afforded any cut-off protection to date. Therefore, those petitions which have previously been dismissed due to their conflict with the Counterproposal should never have been dismissed, as they then would not have been in conflict with a cut-off counterproposal but only with the new, alternative proposal. Thus, if the Commission is to engage in the fiction of treating the Joint Petitioners' alternative proposal as a new rule making, then it must also reinstate the previously dismissed conflicting rule making proceedings and consolidate them with the Joint Petitioners' proposal, along with any other conflicting proposals which remain pending. Further, a new Notice of Proposed Rule Making

must be released to allow the public the opportunity for comment and to file further counterproposals. Obviously, the attempt to go back in time advanced by Joint Petitioners would lead to nothing but a procedural nightmare and would set unfavorable precedent for the future.

WHEREFORE, the premises considered, Fritz hereby respectfully requests that Joint Petitioners' "Application for Review" be denied.

Respectfully submitted,

J. & J. FRITZ MEDIA, LTD.

By: _____
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July 20, 2004

CERTIFICATE OF SERVICE

I, Dan J. Alpert, do hereby certify that on this 20th day of July, 2004, I caused copies of the foregoing "Motion for Extension of Time" to be mailed, first class postage prepaid, addressed to the following persons:

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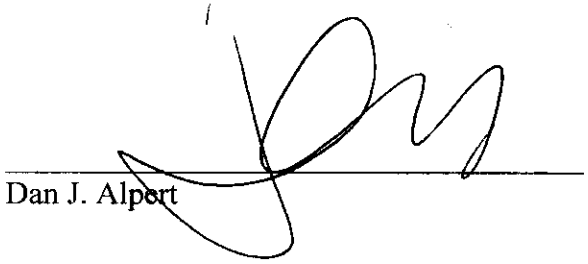

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